

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

74-1498

United States Court of Appeals

FOR THE SECOND CIRCUIT

JAMES V. McLEAN, ETHEL McLEAN, JOSEPH LINFANTE
and SUSAN LINFANTE,

Plaintiffs-Appellees,

—against—

L.P.W. REALTY COMPANY, LAWRENCE PAUL WOLF,
GULF OIL CORPORATION, JOSEPH JAMES, INC.,
and JOSEPH JAMES,

Defendants-Appellees,

JOSEPH JAMES, INC.,

Defendant-Appellant,

GULF OIL CORPORATION,

*Defendant and Third-Party
Plaintiff-Appellee-Appellant,*

—against—

BEAMAN CORPORATION,

Third-Party Defendant-Appellant,

UNITED PORCELAIN CO., INC.,

Third-Party Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF OF THIRD-PARTY DEFENDANT-APPELLEE,
UNITED PORCELAIN CO., INC.**



ALEXANDER, ASH, SCHWARTZ & COHEN
Attorneys for Third-Party Defendant-Appellee
801 Second Avenue
New York, N. Y. 10017

SIDNEY A. SCHWARTZ
IRWIN H. HAUT
of Counsel

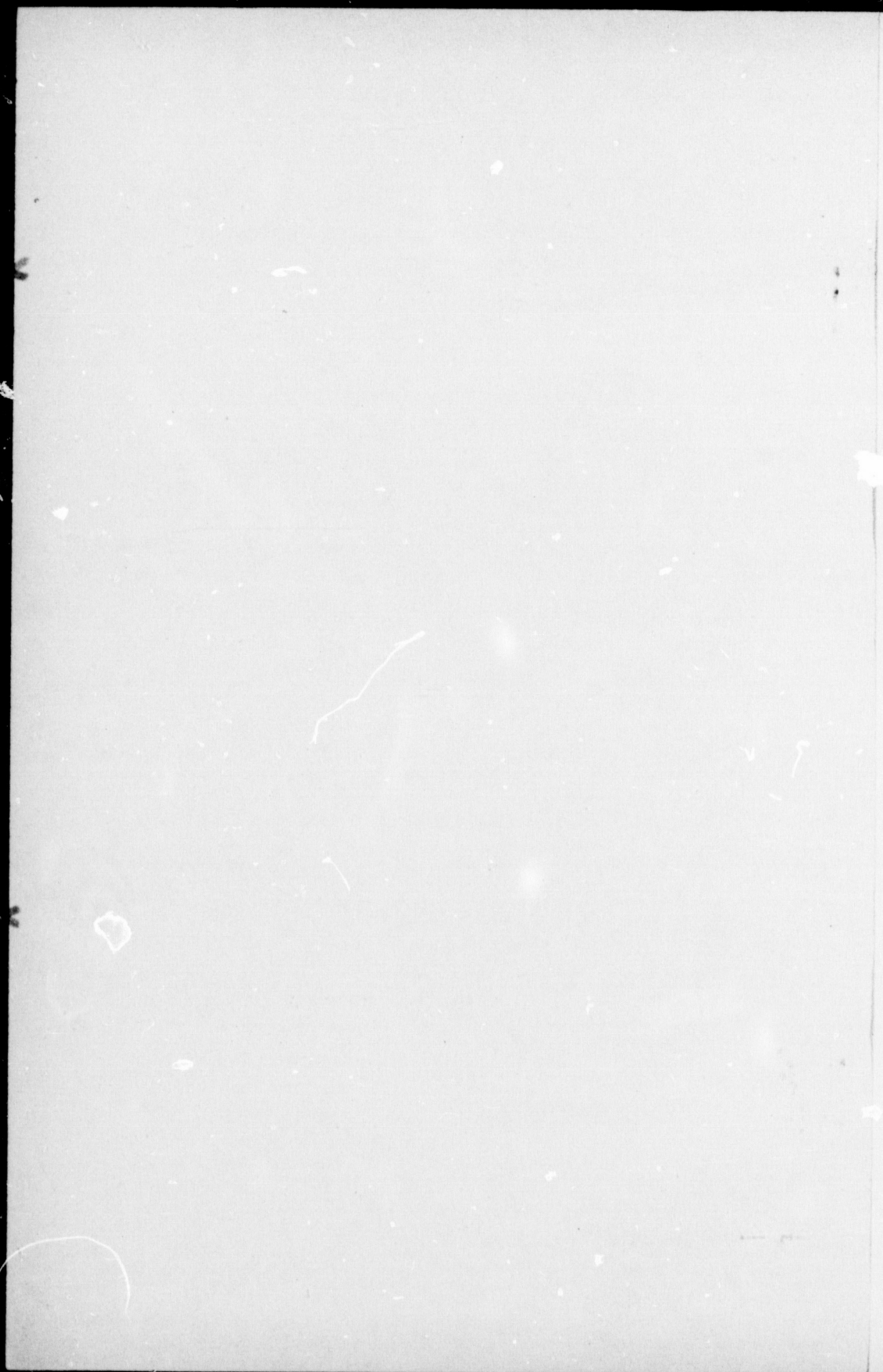


TABLE OF CONTENTS

	PAGE
Statement	2
The Facts	3
POINT I—	
The District Court properly set aside the jury verdict and dismissed Gulf's third-party complaint and Beaman's cross-claim against United Porcelain Co., Inc., as a matter of law	16
(a) United Porcelain stands absolved from negligence by the jury verdict in plaintiff's favor	16
(b) The acts or omissions of United Porcelain, if any, were not the proximate cause of the plaintiffs' injuries	22
CONCLUSION	30

TABLE OF AUTHORITIES

Cases:

Armstrong v. Commerce Tankers Corp., 423 F.2d 957 (2d Cir. 1970)	29
Bolsenbroek v. Tully and DiNapoli, Inc., 12 A.D.2d 376, 212 N.Y.S.2d 323 (1st Dept. 1961), aff'd., 10 N.Y.2d 960, 224 N.Y.S.2d 280 (1961)	15, 25, 28
Delaney v. Towmotors, 339 F.2d 4 (2 Cir. 1964)	22
Dole v. Dow Chemical Co., 30 N.Y.2d 143, 331 N.Y.S.2d 382 (1972)	28

Firman v. Sacia, 7 A.D.2d 579, 184 N.Y.S.2d 945 (3rd Dept. 1959)	15, 24, 25, 26
Haman v. Humble Oil & Refining Co., 34 N.Y.2d 557, 354 N.Y.S.2d 940 (1974)	28, 29
Mustacchia v. Lafayette National Bank, 26 A.D.2d 558, 271 N.Y.S.2d 130 (2nd Dept. 1966), aff'd., 20 N.Y.2d 810, 284 N.Y.S.2d 703 (1967)	26, 27
O'Brien v. Falmore Cab Corp., 18 A.D.2d 1078, 239 N.Y.S.2d 380 (2nd Dept. 1963), aff'd., 15 N.Y.2d 648, 255 N.Y.S.2d 868 (1964)	15, 25, 26
Palsgraf v. Long Island R.R., 248 N.Y. 339 (1928)	23, 24
Rogers v. Dorchester Associates, 32 N.Y.2d 553, 347 N.Y.S.2d 22 (1973)	28
Tauraso v. Texas Co., 275 App. Div. 856, 89 N.Y.S.2d 146 (2nd Dept. 1949), aff'd., 300 N.Y. 567 (1949)	26, 29
Traupman v. American Dredging Co., 470 F.2d 736 (2nd Cir. 1972)	29
Weber v. City of New York, 24 A.D.2d 618, 262 N.Y.S. 2d 222 (2nd Dept. 1965), aff'd., 17 N.Y.2d 790, 270 N.Y.S.2d 759 (1966)	26

United States Court of Appeals

FOR THE SECOND CIRCUIT

JAMES V. McLEAN, ETHEL McLEAN, JOSEPH LINFANTE
and SUSAN LINFANTE,

Plaintiffs-Appellees,

—against—

L.P.W. REALTY COMPANY, LAWRENCE PAUL WOLF,
GULF OIL CORPORATION, JOSEPH JAMES, INC.,
and JOSEPH JAMES,

Defendants-Appellees,

JOSEPH JAMES, INC.,

Defendant-Appellant,

GULF OIL CORPORATION,

*Defendant and Third-Party
Plaintiff-Appellee-Appellant,*

—against—

BEAMAN CORPORATION,

Third-Party Defendant-Appellant,

UNITED PORCELAIN Co., INC.,

Third-Party Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF OF THIRD-PARTY DEFENDANT-APPELLEE,
UNITED PORCELAIN CO., INC.**

Statement

The appellants, Gulf Oil Corporation and Beaman Corporation, appeal, in pertinent part from a judgment of the District Court setting aside a jury verdict and dismissing as a matter of law Gulf's third-party complaint and Beaman's cross-claim against United Porcelain.

This action was tried before Judge Whitman Knapp in the United States District Court for the Southern District of New York. After an extensive trial a jury verdict was rendered in favor of the plaintiffs against Gulf. The jury also apportioned liability between Gulf, Beaman and United Porcelain on the third-party action, which apportionment was thereafter set aside by Judge Knapp as to United Porcelain and the third-party complaint and cross-claim were dismissed. This appeal follows by the appellants *inter se* and as to United Porcelain.

Is there any valid appeal outstanding against United Porcelain Co., Inc.?

At the outset it should be appreciated that the appeal of Gulf against United Porcelain has been dismissed by order of this Court of August 8th, 1974.

Further, it must be appreciated that the original judgment, which adhered to the jury's verdict (790a), provided solely for a recovery over by Gulf against United Porcelain as projected by an apportionment of liability under the substantive law of the State of New York.

The original judgment (810a), which carries into execution the jury's verdict, makes no provision for any right of Beaman against United Porcelain on the former's cross-claim. The subsequent judgments *inter alia* merely dismiss the cross-claim of Beaman.

Consequently, strictly speaking, United Porcelain is not before this Court on this appeal, as the undersigned views the status of the jury's verdict, the original judgment entered thereafter, the notice of appeal of Gulf and the dismissal of Gulf's appeal.

Nonetheless, on the assumption that this Court may not agree with that position in view of the subsequent judgments which provide for the dismissal of Beaman's cross-claim, United Porcelain has decided to set forth the facts and the law which show that it cannot be liable to Beaman (irrespective of Gulf whose appeal has been dismissed). Even if it were liable to Beaman on the latter's cross-claim, what percentage would it be liable for in contrast to the percentage which the jury found in favor of Gulf against United Porcelain which no longer obtains by reason of Gulf's appeal having been dismissed. At best, Beaman's liability of 50% to Gulf, which was dictated by the dismissal by Judge Knapp of Gulf's third-party complaint against United Porcelain, would be reduced to its original liability of 35% established by the jury verdict and codified in the original judgment. There is, therefore, no consequent right of *affirmative recovery* by Beaman against United Porcelain on its cross-claim regardless of the disposition by this Court of Beaman's appeal.

Nonetheless, for a full presentation of what is involved on this appeal, we herewith outline

The Facts

In this action, the plaintiffs, JAMES V. McLEAN and JOSEPH LINFANTE, have sued for personal injuries sustained by them on June 28th, 1966, when an overhang and a section of the coping at the top of a Gulf Service Station to which it was attached gave way under them (405a-408a).*

* References are to pages in Joint Appendix.

The evidence is uncontroverted that the plans for the overhang were prepared by an architect acting on behalf of either Gulf or Beaman, or both, and that the same were furnished by Beaman to United Porcelain for use by McLean and Linfante (267a, 647a-649a, 658a).

The record is further replete with evidence that neither Gulf nor Beaman ever made any inspection of the roof and coping and that neither company issued special instructions to United Porcelain regarding the work to be done by it, nor with respect to any unsafe condition of the roof or coping (275a, 338a, 339a, 353a, 356a).

It was the testimony of Beaman's own witness that United Porcelain would be entitled to rely on Beaman for any special instructions in connection with the work to be done (345a). No such instructions were forthcoming in this case (338a) and Beaman did not request United Porcelain to make any inspection of the premises (354a, 363a, 364a, 400a).

It is crucial to this entire case that the activities of United Porcelain in the erection of the aforesaid overhang entailed no modification or change whatsoever to the existing structure, including the roof proper, or coping (359a, 346a, 364a, 365a, 366a, 389a, 328a). Beaman's own witness said that the plans did not call for any change or modification of the existing structure (319a, 328a) and that same witness testified that United Porcelain was retained only to make the installation *according to specifications, and not to do anything about the roof or coping (345a, 346a), as admitted by Beaman on p. 5 of its brief.*

At the time of the accident McLean and Linfante were entitled to and did rely upon Gulf and Beaman as to the safety of the building including the roof and coping (334a-344a, 345a, 347a, 353a, 476a-477a).

McLean & Linfante were shown to have been experienced metal workers who had performed the identical work involved in this case in the very same manner on numerous occasions without incident. Thus, McLean had himself installed lighting working from the roof and overhang without incident on at least 75 prior occasions, all with Beaman materials (384a, 389a, 397a, 370a, 382a, 384a, 397a) and Linfante on at least 25 prior occasions (370a, 397a) without any difficulty or incident whatsoever (398a, 404a, 480a, 481a, 507a, 508a, 529a).

Thus, at the time in question McLean and Linfante were following their usual practice and procedure in installing the lights from the roof or overhang side (398a-404a, 390a-392a, 395a-396a, and 535a-536a).

Although Beaman had had an extensive and long lasting business relationship with United Porcelain and despite the fact that it was aware through its inspectors (658a-660a) of the manner in which the overhang lighting was installed by United Porcelain from the roof or overhang side of the premises, it never advised United Porcelain that the roof and overhang were not to be used as a working surface during the installation of the lights, or that scaffolds should be used for that purpose (339a, 659a-660a).

Mr. Spencer testified on behalf of Beaman as follows (339a):

"Did Beaman Corporation ever advise United Porcelain Company that there was anything unsafe about the roofing or the coping of the roof?

"A. Not to my knowledge.

"Q. In this premises?

"A. Not to my knowledge.

"Q. Did you ever tell them that they were not permitted to work on the roof or use the roof for purposes

of installing the overhang and the other material, the decorative materials?

"A. No, sir, not to my knowledge.

"Q. Did Gulf Oil Corporation ever instruct you to notify United Porcelain about any special safety precautions that they were to exercise in connection with this job?

"A. Not that our files indicate.

"Q. Did they ever tell Beaman Corporation that they were to instruct United Porcelain not to use the roof or the coping for the purposes of this job?

"A. No, sir."

It was further the testimony of Beaman's own witness that it was possible to put the lights on from the roof itself and that there would be no safety problem in connection therewith (654a).

Thus, Mr. Spencer stated (654a):

"Q. Now, assuming that the roof is in a solid and sound condition and that the wall is in a sound condition, would there be any problem with safety in terms of putting them on from the roof if the men were standing or kneeling on the coping at the time?

"A. No, sir, the only problem would be dropping the light itself.

"Q. There would be no safety problem?

"A. No, sir."

Mr. Spencer further stated that he had never spoken to United Porcelain with regard to the manner in which it installed the lighting (655a) and there is no evidence in the record that anyone acting on behalf of Beaman requested the use of scaffolding in connection with the installation of such lights, despite Beaman's knowledge of

the manner in which they were installed by United Porcelain (339a, 659a-660a).

Mr. Spencer further testified on behalf of Beaman with respect to the strength of Beaman's own overhanging, as installed, and stated (664a):

"Q. And you were asked if there was any safety problem with regard to putting in these lights on the roof, sir. Is your answer based upon the assumption that the men stayed on top of the coping?

"A. It is very awkward way to do it. That's what my answer would be.

"Q. Sir, if they actually went out on top of the overhang itself, would there then be a safety problem?

"A. No, sir.

"Q. Sir, if the drive rivets are not properly installed would that be a safety problem if they stood on the overhang?

"A. Yes, sir.

"Q. Sir, when you spoke of a 30 pound live load, if a man is standing upright and weighs 180 pounds approximately, how much of a live load per square foot would you have there?

"A. Depends on the area. Between the two brackets certainly not—a man standing on the end—one bracket itself would hold perhaps two people standing on the end of it."

The foregoing unequivocal answers of Mr. Spencer make more than apparent that the overhang in question provided a safe surface upon which to work and that *there would be no safety problem even if the men stood on the end of one bracket supporting the overhang if the drive rivets supporting the same were properly installed.*

The evidence is uncontroverted that any impropriety in the installation of the overhang and of the aforesaid drive rivets resulted solely from the improper plans and diagrams furnished by Gulf and Beaman to McLean and Linfante.

It was the evidence that the overhang itself and the top thereof was required to pass completely over the top of the building and its parapet (331-332a, 403a, 652a, 658a).

The overhang itself was supported by triangular brackets, through which the aforesaid drive rivets are driven, and which brackets support the overhang (403a, 517a-518a). The triangular brackets are required to project some distance above the top of the wall and parapet (403a).

It is essential to the stability of the overhang that the triangular brackets upon which it rests *be flush* with the face of the building (394a-395a, 517a-518a). The evidence is uncontroverted in this case that such was impossible, absent some modification of the existing coping, which McLean and Linfante were not permitted to do, or absent additional materials not provided by Beaman, in view of the fact that the coping extended two inches out from the wall of the building (420a-421a). The plans submitted by Beaman to McLean and Linfante clearly indicated that the overhang was to pass over the wall or parapet of the building without alerting McLean and Linfante to whether it was to pass over the wall itself or over any coping at its top, according to plaintiffs' expert (423a) and were clearly improper in that regard (423a). Beaman's witness asserted that the overhang was intended, under its plans furnished to McLean and Linfante, to go over the coping at the top of the wall (652a, 658a).

McLean and Linfante, in properly following the plans and in the absence of any other materials, caused the over-

hang to go across the coping and in so doing were required to drive rivets into the coping itself (423a, 447a, 518a-519a, 522a). This was necessary since they were not permitted to make any changes to the wall and coping, as noted above.

McLean and Linfante were well aware that the coping served no structural purpose whatsoever, but was merely decorative. However, despite that fact the coping was thus used by them for weight bearing (407a, 421a, 519a-522a).

It follows that at least some part of the weight of the overhang was supported by the structurally inadequate coping (521a-522a, 526a).

The result was that while McLean and Linfante were properly installing the lighting, in part from the coping and overhang (405a), the overhang and coping caved in propelling McLean and Linfante to the ground (406a-408a, 410a-413a, 420a, 422a, 533a, 547a-550a, 554a, 555a).

That the sole cause of the accident was the improper plans furnished by Gulf and Beaman to United Porcelain (648a, 658a) is clearly indicated by even casual recourse to plaintiff's Exhibit 7, reproduced at p. 26 of the Exhibit Volume, showing that the top of the overhang is indeed intended to pass over the wall and the parapet and that the triangular rivet must be flush with the face of the building. It, furthermore, is apparent from the said exhibit that the existence or presence of a coping is not mentioned or in any way indicated on the diagram in question, thus failing to alert McLean and Linfante to the problem presented by the existence of a coping projecting several inches from the face of the building, as was the situation in this case, rendering it impossible for them to comply fully with such diagram.

It was the testimony of Mr. Spencer that the overhang was not to be attached to the coping (649a). And, yet,

despite that fact and despite such knowledge on Beaman's part, the plans provided to United Porcelain by Gulf and Beaman required that rivets be driven into the coping if the top of the overhang was to pass over the top of the parapet and coping.

Mr. Spencer was questioned further with regard to the inspection of the work premises and stated that Beaman had not made any inspection of the roof or the coping of the building, despite the fact that one of Beaman's own men went to the premises to take measurements (661a-662a) and yet he had never advised United Porcelain of that fact (660a-661a).

He testified further as follows (658a-659a):

"Q. You indicated that you did indeed draw that large diagram which you sent to the customer Gulf and a copy of which you sent to United Porcelain, is that correct?

A. That was a Beaman drawing, yes.

Q. Before you submitted that Beaman drawing to either United Porcelain or to Gulf, did you ever arrange to have any inspection made of the roof or coping on this premises? Just yes or no.

A. No.

Q. Now, after you anticipated, according to this drawing, that the overhang would go above and across that coping—is that correct?

A. Yes.

Q. You also anticipated, did you not, that in putting up this overhang that work would be done from the roof side. Isn't that a fact?

A. From the roof side?

Q. Yes.

A. Some work would be done from the roof side, yes.

Q. You understood when that overhang was going to be put on that certain work was to be done from the roof side, is that correct? Just yes or no.

A. Yes.

Q. Did you ever provide any scaffolds at this job site for any of the employees of United Porcelain?

A. No, sir.

Q. Did you ever write to them or suggest to them in writing that they should provide scaffolds to put in the lighting perimeter?

A. I have no idea.

Q. Did you ever see any such letter or memorandum in your file?

A. No, sir."

Despite knowledge that the overhang in question would by the nature of the plans submitted be required to go over the coping and that rivets would, therefore, necessarily have to be driven into the same, with its consequent dangers to McLean and Linfante, Beaman provided such plans to United Porcelain without any warning whatsoever of the dangers attending upon the following of the plans by McLean and Linfante.

Again, it should be noted in this regard that United Porcelain and its employees, McLean and Linfante, had nothing whatsoever to do with structural modifications, alterations, or changes. Thus, they would not have been in a position and had not been authorized to modify, alter or remove the coping (663a).

The plaintiffs, McLean and Linfante, were the only employees of United Porcelain on the job (542a), and there is no evidence that there was any request whatsoever of United Porcelain, by either McLean or Linfante, for the use of scaffolding in connection with the installation of the lights.

At the close of the evidence in this case United Porcelain moved for a directed verdict dismissing the third-party complaint of Gulf and the *cross-claim* of Beaman (and not third-party complaint, which is non-existent [40a-42a], despite references thereto by Beaman's counsel) (634a-638a, 645a), and said motions were denied by the Court.

This case was submitted to the jury after a full and extensive charge. Verdicts were rendered by the jury after having requested the reading to it of that portion of Mr. Spencer's testimony quoted above, dealing with the weight bearing capacity of Beaman's overhang (778a-779a). The jury also requested the reading of that portion of the testimony of the plaintiff's expert witness, Mr. Leavin, also dealing with the weight bearing capacity of the overhang (778a-779a). Thereafter, the jury rendered a verdict in favor of the plaintiffs and against Gulf in the sum of \$90,000 and apportioned liability between Gulf, Beaman and United Porcelain, finding Beaman to have been 35% negligent, Gulf, 35% negligent and United Porcelain, 30% negligent (789a-791a).

Subsequent to the jury verdict, United Porcelain moved, both orally (792a-793a) and on formal papers, to have the jury verdict set aside as to it on the same grounds as previously offered in support of its motion for a directed verdict.

By formal decision, Judge Knapp in pertinent part, granted the motion of United Porcelain and in so holding stated as follows (804a-806a):

"Beaman and United Porcelain (acting for Gulf and various other oil companies) had—prior to the instant accident—installed some seventy such overhangs in routine fashion and without incident. The

instant installation presented a problem in that the gas station's wall was surmounted by a concrete coping which extended an inch or two over the edge of the wall, preventing the necessary flush relationship between the triangular brace and its supporting metal plate. Any competent professional who carefully examined the wall would have realized that the above-described standard procedures were inappropriate. It would obviously have been impossible to install the metal plate (which must adhere to the wall) in such a manner that its top would be level with the top of the coping. It could only extend to the bottom of the coping (see Exhibit 14G-1). Consequently, either the coping would have to have been removed so that the overhang assembly would be flush with the top of the wall, or an additional element—of the same depth as the coping—would have to have been supplied for insertion between the triangular brace and the overhang so that the top of the brace could have been level with the top of the metal plate to which it was attached. In such situation it would have been the new element upon which the overhang actually rested.

However, the architect's blueprints do not signal the problem, and Beaman delivered to United Porcelain the overhang's normal components, with no indication that they should be dealt with in anything but routine fashion.³

Plaintiffs, acting on United Porcelain's behalf and apparently following the blueprints as best they could, installed the triangular braces by driving the top two

³ The witnesses who testified concerning the blueprint seem to have been in doubt as to whether it showed the coping. In any event, Gulf is clearly chargeable with knowledge of the structure of its own building, and the blueprint should have made clear that some modification of the standard design was required to take into account the problem posed by the coping.

rivets *not* into the weight-distributing metal plates, but into the ornamental coping (see Exhibit 14G-1).

Not unpredictably, when the plaintiff workmen put their weight on the overhang in the course of installing lights on its outer edge, the coping gave way and the whole structure collapsed (see Exhibit 14G-1). Testimony offered by Beaman established that the man's weight on the overhang could not possibly have caused the accident had the overhang been properly installed.

The cause of the accident being obvious, two basic questions were put before the jury:

- (1) Was Gulf negligent in failing to warn the plaintiffs of the danger inherent in installing the overhang in accordance with the blueprint; and
- (2) Were plaintiffs negligent in not themselves perceiving the danger, or were they justified in simply following instructions given them by Gulf and Beaman?

The jury answered both questions in plaintiffs' favor.

United Porcelain takes the position that since the jury exonerated its employees (i. e. plaintiffs) of negligence, there is no basis for imputing negligence to it (United Porcelain). Beaman counters with the contention that the jury had the right to find United Porcelain negligent in failing to provide its employees with scaffolding on which they could have stood while doing their work rather than working from the top of the overhang. Had they been standing on a scaffold their weight could not, of course, have caused the overhang to fall.

There seem to be two conclusive answers to Beaman's contention. First, the only purpose in providing a scaffold would have been to guard against the danger of plaintiffs falling *off* the overhang. Assum-

ing proper construction (upon which assumption the jury found plaintiffs entitled to rely), there would have been no other danger to guard against. But there appears never to have been any danger of their falling off, at least no such danger eventuated. It follows that United Porcelain's negligence, if any, had no part in causing the accident. See *Firman v. Sacia* (3d Dept. 1959) 184 N. Y. S. 2d 945; *Bolsenbrook v. Tully & DiNapoli, Inc.* (1st Dept. 1961) 212 N. Y. S. 2d 323, aff'd 10 N. Y. 2d 960; *O'Brien v. Fallmore Cab* (2d Dept. 1963) 239 N. Y. S. 2d 380, aff'd (1964) 15 N. Y. 2d 648.

In the second place, plaintiffs' evidence and evidence offered by Beaman established that it had not been the practice to employ scaffolds on the seventy prior jobs upon which United Porcelain and Beaman had worked, and that Beaman was aware of this practice. There is no suggestion that Beaman ever requested the use of scaffolds. Indeed, the witness for Beaman was specifically asked whether such a request had been made and testified that he had no knowledge of any having been made. In the circumstances, Beaman is in no position to impute negligence to United Porcelain on the ground that it had followed its usual procedures in the instant case.

United Porcelain's motion for judgment notwithstanding the verdict is accordingly granted, and the claim-over is dismissed as to it." (Italics in text supplied.)

In a supplemental memorandum, Judge Knapp significantly noted that it was conclusively established,

"... that a properly installed overhang would easily have supported the weight of both plaintiffs standing on the overhang's extreme outer edge, and conse-

quently the plaintiffs' negligence—or lack of it—in positioning themselves on the overhang had no more bearing on this litigation than what the plaintiffs had had for breakfast on the morning of the accident” (808a). (emphasis supplied)

It is respectfully submitted that the District Court was eminently correct in setting aside the jury verdict against United Porcelain and dismissing Gulf's third-party complaint and Beaman's cross-claim as a matter of law on the grounds so cogently stated by the District Court.

POINT I

The District Court properly set aside the jury verdict and dismissed Gulf's third-party complaint and Beaman's cross-claim against United Porcelain Co., Inc., as a matter of law.

(a) United Porcelain stands absolved from negligence by the jury verdict in plaintiffs' favor

As noted above, McLean and Linfante were the only employees of United Porcelain on the premises. It follows, therefore, that any negligence on the part of this corporate third-party defendant could only have come about through the medium of its only employees on the premises, i.e., McLean and Linfante themselves. Thus, since any negligence on the part of United Porcelain could only have come about through the medium of McLean and Linfante, there can be no recovery over as a matter of law against United Porcelain by Gulf on its third-party complaint, or by Beaman on its cross-claim.

In this case, the jury found in favor of McLean and Linfante and against Gulf. Such verdict carries with it an express finding that McLean and Linfante were free

from contributory negligence, else they could not have recovered. It must, therefore, follow, that United Porcelain, which was acting only through McLean and Linfante in this case, was equally free from negligence. For the jury, therefore, to have found on the one hand that McLean and Linfante were entitled to a recovery and to have yet permitted Gulf and Beaman to recover over and against United Porcelain to the extent of 30% of the plaintiffs' recovery is surely inconsistent as a matter of law.

There is not one scintilla of credible evidence whatsoever presented which could project the liability and negligence of United Porcelain arising in any manner other than through the medium of McLean and Linfante's own actions. Thus, although at the time in question they were working from the roof of the building, rather than from any scaffolding, it cannot be controverted that the roof and parapet provided a safe surface upon which to work, and that no request for scaffolding for use in installing the lights was ever made by McLean and Linfante. Surely, as the only employees of United Porcelain on the scene they were the only ones who were in a position at the time in question to determine whether scaffolding was needed. No such request was ever made.

It has been shown from the testimony, elicited by Gulf upon its cross-examination of Mr. Spencer, Beaman's own witness, that the overhang could support the weight of two men and that even one bracket itself would hold two people standing on the end of it.

Indeed, it must be recognized that the only impropriety or negligence with respect to the entire operation involved in this case arose from the clearly improper diagrams and plans supplied to United Porcelain by both Gulf and Beaman, which made clear and apparent that the overhang was to be annexed and attached to the coping.

It is also clear that the function of United Porcelain was not to make any changes to existing structure, but merely to follow in detail the diagram and plans provided. Thus, the accident in question resulted solely from the proper acts of United Porcelain's employees in following diagrams and plans supplied by Gulf which were defective.

The issue of whether the plaintiffs were contributorily negligent in following plans which they knew or should have known were defective was clearly and emphatically submitted to the jury and such question was resoundingly resolved by a verdict in favor of the plaintiffs, finding them free from contributory negligence.

Thus, the Court charged the jury as follows (733a-734a):

"As I understand the plaintiffs' contention, it is that the accident happened because the plans which were prepared—and we will come to who prepared them and how, later—the plans called for using the coping to bear weight of the overhang and that the plaintiffs were following the instructions in those plans and that those plans were defective in that the coping, which somebody, one of the witnesses, describes for us as an architectural ornament, should not have been used to bear weight and that that is the cause of the accident."

And, again, the Court charged the jury to the effect that if McLean and Linfante knew that it was improper to utilize the coping for weight bearing that they would then be contributorily negligent and stated (736a-737a):

"If in fact it is your judgment that the plaintiffs should have seen that, should have seen that this was coping that they were dealing with and should have known that putting weight-bearing rivets, plugs, rivets into that coping was a foolish thing to do, a negligent

thing to do, then they are guilty of what is called contributory negligence, and that is the end of the case. They are not entitled to recover as against anyone else, because in a negligence case, the law says that you have to establish that you are free from contributory negligence.

You have heard the arguments on that. The defendants argue that the coping was as obvious to them as anyone else, and they should have known that putting weight bearing on the coping was a foolish thing to do and a negligent thing to do."

Since the jury found that the plaintiffs were not contributorily negligent, it must follow, as day follows night, that the plaintiffs, and through them United Porcelain, were not negligent in following defective plans, in utilizing the coping for weight-bearing and in attempting to install the lights from the overhang, rather than through the use of scaffolding.

It follows, therefore, that the sole predicate of liability on the part of the plaintiffs against Gulf is one as to which United Porcelain has been exonerated by the jury.

And, again, the District Court clearly charged the jury that the liability of Gulf under the plaintiffs' theory was predicated upon whether the plans in question were improper and whether Gulf had thereby a binding affirmative obligation to notify somebody so as to prevent such work being done (737a-738a).

Similarly, the Court further charged the jury with respect to the liability issues between Gulf, Beaman and United Porcelain and advised the jury that it could find McLean and Linfante guilty of contributory negligence on the basis of their having gone out on the overhang to work (765a-766a). Instructive in this regard is the fact

noted above that the jury requested a reading to it of the portions of Mr. Leavin's and Mr. Spencer's testimony regarding the weight-bearing capacity of the overhang. Implicit in the jury verdict in favor of the plaintiffs is the resolution of that issue in their favor and in favor of United Porcelain. It follows that they were not guilty of contributory negligence in having gone out on the overhang to work and it must similarly follow that United Porcelain was not negligent in permitting them so to do. There is, therefore, no merit whatsoever in the contention by Beaman and Gulf to the effect that United Poreclain should have provided the plaintiffs with scaffolding to do such work, instead of permitting them to do it from the roof for the following reasons. Firstly, there is not one scintilla or shred of credible evidence that any such scaffolding was required, or that the overhang in question was not a safe place upon which to work.

Secondly, the testimony of Beaman's own witness was clear and unequivocal that the overhang in question was a safe place upon which to work.

Thirdly, and of most importance, is the fact that the jury had previously been charged, as noted above, that McLean and Linfante could be found to have been contributorily negligent for proceeding out over the overhang to install the lighting in question, rather than installing the same by other means, such as the use of scaffolding. Since no request was ever made by the plaintiffs to United Porcelain for such scaffolding, and since the jury found for the plaintiffs, it must be concluded that both they and their employer were equally free from negligence in that regard and that no duty devolved upon United Porcelain to provide any scaffolding in this case.

Despite the assertions by counsel for Beaman and Gulf in their respective briefs, that there are other unspecified

predicate of negligence on the part of United Porcelain, other than the alleged failure to provide scaffolding (Beaman p. 22, Gulf p. 13) the foregoing makes crystal clear that the only "possible" predicate of liability on the part of United Porcelain is such failure to supply scaffolding. Since it appears from the foregoing that no such duty devolved upon United Porcelain, and that, in any event, it has completely been exonerated from any liability on that ground by virtue of the jury verdict in favor of the plaintiffs, it must be concluded that the District Court was eminently correct in setting aside the jury verdict in favor of Gulf and Beaman and against United Porcelain.

This conclusion is further buttressed by the decision of Judge Knapp, fully supported by the evidence, in which he pointed out that the plaintiffs' evidence and Beaman's evidence established that it had not been the practice to employ scaffolds on the 70 prior jobs upon which United Porcelain and Beaman had worked and that Beaman was aware of this practice (806a). Judge Knapp significantly noted (806a):

"There is no suggestion that Beaman ever requested the use of scaffolds. Indeed, the witness for Beaman was specifically asked whether such a request had been made and testified that he had no knowledge of any having been made. In the circumstances, Beaman is in no position to impute negligence to United Porcelain on the ground that it had followed its usual procedures in the instant case."

Since the briefs of Gulf and Beaman do not question the plaintiffs' recovery, it is unquestioned that they admit that they were liable to the plaintiffs because of a defective condition of the structure upon which the plaintiffs worked and that the plans and specifications were

defective in not revealing the physical condition which eventually caused the accident. How can either of those appellants have any rights against UNITED PORCELAIN where they were the authors of the plans and specifications upon which UNITED PORCELAIN relied? Indeed, this Court has had this proposition heretofore in a cognate situation and affirmed summarily the dismissal of the third-party complaint by the District Court. In *Delaney v. Towmotor Corporation*, 339 F. 2d 4, this Court said (page 7):

"With respect to Towmotor's claim over against the manufacturer of the guard, the judge found that the allegedly defective design which must have constituted the ground for Delaney's verdict against Towmotor was that which Towmotor specified. There is no possible basis for thinking this to be clearly erroneous."

The foregoing arguments have been made against the contentions of GULF and BEAMAN. However, it must be remembered that this Court has dismissed GULF's appeal by an order of this Court of August 8, 1974. It therefore follows that GULF is no longer an appellant in this matter as against UNITED PORCELAIN and any disposition of this appeal, if UNITED PORCELAIN's non-liability is to be reversed, does not carry with it a reinstatement of GULF's claim against UNITED PORCELAIN.

The holding of the District Court, embodied in the judgment exonerating UNITED PORCELAIN, should be affirmed.

(b) *The acts or omissions of United Porcelain, if any, were not the proximate cause of the plaintiffs' injuries*

It is not conceded that United Porcelain was guilty of negligence in this case, or that any acts, or omissions on its part contributed, or caused the injuries of McLean

and Linfante. To the contrary, as pointed out in Point I(a), *supra*, no such evidence whatsoever exists in this case.

It is furthermore respectfully submitted that the failure to supply scaffolding was not the proximate cause of the said injuries as a matter of law. As most clearly pointed out by Judge Cardozo in *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339 (1928), proof of negligence in the air is insufficient and before negligence can be predicated of a given act, there must be sought and found a duty owing to the individual complaining, the observance of which would have averted or avoided the injury. As eloquently stated by that Court,

"the risk reasonably to be perceived, defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension."

Applying such principle in this case it must be concluded that no *duty* devolved upon United Porcelain to provide scaffolding. Thus, since the risk reasonably to be perceived defines the *duty* to be obeyed, any such *duty* to provide scaffolding could only have been predicated upon the theory that United Porcelain should have perceived and foreseen that improper plans would be furnished by Gulf and Beaman to its employees. It is submitted that United Porcelain had the right to assume that proper plans would be so furnished and that it was not required as a matter of law to foresee the possibility that improper plans would be furnished. There is no question whatsoever but that if proper plans had been furnished the plaintiffs could have properly installed the lighting in the identical manner in which they had so done previously on many occasions, without the use of scaffolding and working from the overhang itself.

Since the furnishing of such defective plans clearly did not come within the risk to be perceived by United Por-

celain when it sent its men to work on the premises, there devolved no duty under *Palsgraf, supra*, to provide any scaffolding.

It matters little in the instant case whether the doctrine of foreseeability be regarded as the measure of the duty, as in *Palsgraf, supra*, or as a test of proximate causation. *Firman v. Sacia*, 7 A.D.2d 579, 184 N.Y.S.2d 945 (3d Dept. 1959). Under either approach the result will be the same, i.e., the absence of any liability whatsoever on the part of United Porcelain.

Beaman, in arguing against the decision of the District Court exonerating United Porcelain from liability applies the erroneous "but for" reasoning, which has consistently been rejected by the courts of New York. Thus, counsel argues that "but for" the absence of scaffolding in this case the accident would not have occurred. However, to apply such argument *ad absurdum*, it could equally be argued that the act of McLean and Linfante in going to work that morning was a proximate cause of their accident since "but for" such fact the accident would not have occurred. However, counsel overlooks the fact that the failure to provide scaffolding was not the *cause* of the instant accident and as pointed out by the District Court had as much to do with this litigation as what the plaintiffs had had for breakfast on the morning of the accident (808a).

As conclusively pointed out in this regard by the District Court the only purpose in providing a scaffold would have been to guard against the danger of plaintiffs falling off the overhang (805a).

The Court noted further that assuming proper construction of the overhang, "*upon which assumption the jury found plaintiffs entitled to rely,*" there would have been

no other danger to guard against and significantly added (806a):

"But there appears never to have been any danger of their falling off, at least no such danger eventuated. It follows that United Porcelain's negligence, if any, had no part in causing the accident. See *Firman v. Sacia* (3d Dept. 1959) 184 N.Y.S. 2d 945; *Bolsenbrook v. Tully & DiNapoli, Inc.* (1st Dept. 1961) 212 N.Y.S. 2d 323, aff'd 10 N.Y. 2d 960; *O'Brien v. Fallmore Cab* (2d Dept. 1963) 239 N.Y.S. 2d 380, aff'd (1964) 15 N.Y. 2d 648"

In each of the following cases the injuries complained of would not have occurred "but for" the fact that a prior allegedly wrongful act was performed, which was charged to be the proximate cause of the injury and, nevertheless, liability on the part of the actor was denied. Thus, in *Bolsenbrook v. Tully & DiNapoli, Inc.*, 12 A.D.2d 376, 212 N.Y.S.2d 323 (1st Dept. 1961) aff'd 10 N.Y.2d 960, 224 N.Y.S.2d 280 (1961) the accident would not have occurred had the defendant refrained from leaving smudge pots adjacent to a ditch it had excavated. The Court denied liability to an infant who was injured when another child placed a rag into the flame of one of the smudge pots and hurled the same into the infant plaintiff's face, on the ground that the act of the defendant was not the proximate cause of the injuries as a matter of law.

In so holding, the Court stated (212 N.Y.S.2d at 325):

"Moreover, the infant plaintiff's assault by an unidentified boy was not reasonably foreseeable. *Palsgraf v. Long Island R. R. Co.*, 248 N.Y. 339, 162 N.E. 99, 59 A.L.R. 1253; *Beickert v. G. M. Laboratories*, 242 N.Y. 168, 151 N.E. 195, *Perry v. Rochester Lime Co.*, 219 N.Y. 60, 113 N.E. 529, L.R.A. 1917B, 1058; *Morse*

v. Buffalo Tank Corp., *supra*. The assault was the intervening and competent producing cause of the occurrence and injuries. *Saugerties Bank v. Delaware & Hudson Co.*, 236 N.Y. 425, 141 N.E. 904; *Perry v. Rochester Lime Co.*, *supra*; *Gralton v. Oliver*, 277 App.Div. 449, 101 N.Y.S.2d 109. The act of a party sought to be charged is not to be regarded as a proximate cause unless it is in clear sequence with the result and unless it could have been reasonably anticipated that the consequences complained of would result from the alleged wrongful act. *Saugerties Bank v. Delaware & Hudson Co.*, *supra*, 236 N.Y. at page 430, 141 N.E. at page 905.

"Since the evidence as to the cause of the accident which injured plaintiff is undisputed the question as to whether any act or omission of the defendant * * * was a proximate cause thereof was one for the court and not for jury." *Gralton v. Oliver*, *supra*, 277 App. Div. at page 454, 101 N.Y.S.2d at page 114; see, also, *Hoffman v. King*, 166 N.Y. 618, 628, 55 N.E. 401, 404, 46 L.R.A. 672; *Trapp v. McClellan*, 68 App.Div. 362, 365, 74 N.Y.S. 130. The evidence on proximate cause is undisputed and therefore the issue was one for the court to decide."

See also to identical effect—*Firman v. Sacia*, *supra*; *O'Brien v. Falmore Cab Corp.*, 18 A.D.2d 1078, 239 N.Y.S. 2d 380 (2d Dept. 1963), *aff'd* 15 N.Y.2d 648, 255 N.Y.S.2d 868 (1964); *Weber v. City of New York*, 24 A.D.2d 618, 262 N.Y.S.2d 222 (2d Dept. 1965) *aff'd* 17 N.Y.2d 790, 270 N.Y.S.2d 759 (1966); *Tauraso v. Texas Co.*, 275 App.Div. 856, 89 N.Y.S.2d 146 (2d Dept. 1949), *aff'd* 300 N.Y. 567 (1949).

In *Mustacchia v. Lafayette National Bank*, 26 A.D.2d 558, 271 N.Y.S.2d 130 (2d Dept. 1966), *aff'd* 20 N.Y.2d 810,

284 N.Y.S.2d 703 (1967), an action was instituted against a general contractor and others for injuries sustained by plaintiff, a bricklayer, while attempting to cross a trench excavated by the general contractor, by means of a board which had been placed over the trench by the plaintiffs' own employer. In denying liability on the part of the general contractor, the Appellate Division stated (271 N.Y.S.2d at 131):

"Even if it were incumbent upon the general contractor to provide a safe passageway across the trench, the failure to perform such duty was not the proximate cause of the happening of the accident. The injury did not result from the trench, as one defectively built (*Rufo v. Orlando*, 309 N.Y. 345, 130 N.E.2d 887; *Milne v. Chandler & Hatlee*, 45 Misc.2d 593, 257 N.Y.S.2d 476, *affd.* 23 A.D.2d 711, 257 N.Y.S.2d 460); or left unguarded (*Vallina v. Wright & Kremers*, 7 A.D.2d 101, 180 N.Y.S.2d 707). Negligence of anyone other than plaintiff, if such there was, was exclusively that of his employer, for which defendants are not liable (*Iacono v. Frank & Frank Contr. Co.*, 259 N.Y. 377, 381, 182 N.E. 23, 24; *Zucchelli v. City Constr. Co.*, 4 N.Y.2d 52, 56, 172 N.Y.S.2d 139, 142, 149 N.E.2d 72, 74)."

It should be noted that the Court in so holding assumed a *duty* on the part of the general contractor to provide a safe passageway across the trench. It is self-apparent that if the general contractor had performed its duty and provided such safe passageway that the accident would not have occurred. Thus, under the reasoning espoused by Beaman's counsel in this case "but for" the fact that the general contractor failed in such duty the accident in *Mustacchia*, *supra*, would not and could not have occurred. And, yet, the Court denied liability in *Mustacchia* on the

ground that any such failure to perform that duty was not the proximate cause of the accident. It must similarly be concluded in this case that any failure to supply scaffolding on the part of United Porcelain, cannot be regarded as the proximate cause of the accident, since the absence of such scaffolding surely did not *cause* the accident and it could not reasonably have been anticipated or foreseen that the consequences complained of in this case would result from such failure to provide scaffolding. On the contrary, it is apparent from the foregoing that the *sole* proximate cause of the instant occurrence was the negligence of Gulf and Beaman in providing inadequate and improper diagrams and plans.

Where the evidence as to the cause of an accident is undisputed as in the instant case, the question as to whether any act or omission on the part of United Porcelain was a proximate cause thereof is one for the Court and not for the jury. *Bolsenbroek, supra*.

The reliance by Beaman upon *Rogers v. Dorchester Associates*, 32 N.Y.2d 553, 347 N.Y.S.2d 22 (1973) and *Haman v. Humble Oil & Refining Co.*, 34 N.Y.2d 557, 354 N.Y.S.2d 940 (1974), is misplaced.

To permit recovery of indemnity or contribution under *Dole v. Dow Chemical Co.*, 30 N.Y.2d 143, 331 N.Y.S.2d 382 (1972), there must be found to have been a breach of duty which United Porcelain owed to Beaman and Gulf, respectively. However, as pointed out above, in Point I (a) and (b), no such breach of duty exists in this case.

Furthermore, there is no contractual right of indemnity in favor of either Beaman or Gulf against United Porcelain, rendering *Haman* inapplicable, and the evidence is more than ample in this case to justify the jury verdicts of negligence on the parts of Beaman and Gulf respectively, by virtue of their respective failures to inspect and

the furnishing of improper plans and diagrams, thereby rendering *Rogers* and *Haman* inapplicable.

It should furthermore be pointed out that Beaman is in the unenviable position of arguing out of both sides of its mouth at the very same time. Thus, on the one hand, it argues for re-instatement of the jury verdict against United Porcelain, finding it 30% negligent, and in the very same breath it argues that the entire jury verdict be set aside and that the entire burden of the third-party action be borne solely by United Porcelain.

It is respectfully submitted herein that the jury verdict was properly set aside by the District Court. There is no tenable or rational basis whatsoever for setting aside the jury verdict in the manner contended for by Beaman and thrusting the entire responsibility for the accident on United Porcelain, in view of Beaman and Gulf's own egregious and negligent acts, outlined above, which burst forth from the record.

The standard applied by this Court in determining the propriety of setting aside a jury verdict has been well articulated in *Armstrong v. Commerce Tankers Corp.*, 423 F.2d 957 (2nd Cir. 1970). As pointed out by this Court such motion is properly granted where there is a complete absence of probative evidence to support a verdict for the non-movant, or the evidence is so strongly and overwhelmingly in favor of the movant that reasonable and fair-minded men in the exercise of impartial judgment could not have arrived at a verdict against him. It is respectfully submitted that under the facts of this case the District Court must be found to have properly set aside the verdict of the jury against United Porcelain under either of the two theories referred to above, *Armstrong v. Commerce Tankers Corp.*, *supra*; *Traupman v. American Dredging Co.*, 470 F.2d 736 (2d Cir. 1972). The action of the

District Court should, therefore, be affirmed insofar as it dismissed the third-party complaint of Gulf against United Porcelain and insofar as it dismissed the cross-claim of Beaman against United Porcelain.

CONCLUSION

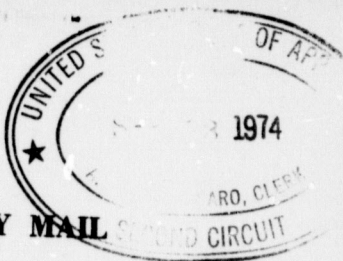
The District Court was eminently correct in setting aside the jury verdict against United Porcelain and in dismissing the third-party complaint and cross-claim asserted by Gulf and Beaman respectively against United Porcelain. The action of the District Court in this regard should, accordingly, be affirmed, to which ends this brief is

Respectfully submitted,

ALEXANDER, ASH, SCHWARTZ & COHEN
*Attorneys for Third-Party
Defendant-Appellee,
United Porcelain Co., Inc.*
801 Second Avenue
New York, New York 10017
Tel.: (212) 889-0410

SIDNEY A. SCHWARTZ
IRWIN H. HAUT

of Counsel.



AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK,
CITY OF NEW YORK,
COUNTY OF New York , ss.:

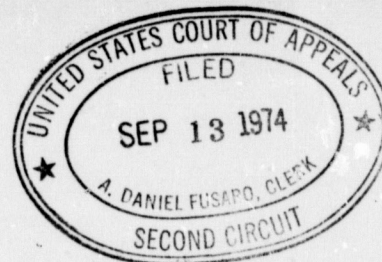
Daniel Sweat, being duly
sworn, deposes and says that he is over 18 years of age.
That on the 12th day of September, 1974,
he served 2 copies of the within Brief
upon ~~ROBERT L. WINOKER~~ L. Louis Winoker, the
attorney for the above-named Defendant-Appellees
by depositing 2 copies of the same securely enclosed
in a post-paid wrapper in a branch depository maintained
and exclusively controlled by the United States Post Office
at Greenwich & Vestry Streets
addressed to said attorney for the Defendant-Appellees
at No. 88-02 Sutphin Boulevard
Jamaica, New York 11435, that
being the address within the State designated by him
for that purpose upon the preceding papers as the place
where he regularly kept an office, and at which place
he regularly received mail.

Sworn to before me this
12th day of September, 1974.

Abraham L. Meilen Daniel Sweat

ABRAHAM L. MEILEN
NOTARY PUBLIC, State of New York
No. 31-9821352
Qualified in New York County
Commission Expires March 30, 1976

AFFIDAVIT OF SERVICE BY MAIL



State of New York,
City of New York,
County of New York, ss.:

Daniel Sweat, being duly sworn, deposes and says that he is over 18 years of age. That on the 12th day of September 1974, he served 2 copies of Brief upon Furey & Mooney, the attorneys for the above-named Defendant-Appellant and Third Party Plaintiff-Appellee-Appellant, by depositing 2 copies of the same securely enclosed in a post-paid wrapper in a branch depositary maintained and exclusively controlled by the United States Post Office at Greenwich & Vestry Streets addressed to said attorney for the Defendant-Appellant and Third-Party Plaintiff-Appellee-Appellant at 600 Front Street, Hempstead, New York 11550, that being the address within the State designated by them for that purpose upon the preceding papers as the place where they regularly kept an office, and at which place they regularly received mail.

Sworn to before me this
12th day of September 1974

Daniel Sweat
.....

Abraham L. Meilen

ABRAHAM L. MEILEN
NOTARY PUBLIC, State of New York
No. 31-9821352
Qualified in New York County
Commission Expires March 30, 1976

